Nos. 76-1822 and 76-1859

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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MATTHEW MADONNA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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SALVATORE LARCA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## INDEX


Page

Opinion below ..... 1

Jurisdiction ..... 1

Questions presented ..... 2

Statement ..... 2

Argument ..... 4

Conclusion ..... 11


## CITATIONS


Cases:

*Andresen* v. *Maryland*, 427 U.S. 463 ..... 8

*Dorszynski* v. *United States*, 418 U.S. 424 ..... 10

*Gordon* v. *United States*, 383 F. 2d 936, certiorari denied, 390 U.S. 1029 ..... 9-10

*Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 ..... 7

*Nuttal* v. *Reading Company*, 235 F. 2d 546 ..... 7

*Shepard* v. *United States*, 290 U.S. 96 ..... 7

*Taylor* v. *McKeithen*, 407 U.S. 191 ..... 11

*United States* v. *Clemons*, 503 F. 2d 486 ..... 9

*United States* v. *Smith*, 551 F. 2d 348 ..... 10

Statutes and rules:

21 U.S.C. 841(a)(1) ..... 2

21 U.S.C. 846 ..... 2

21 U.S.C. 963 ..... 2

Page

Federal Rules of Evidence:

Rule 404(b) ..... 8

Rule 609 ..... 10, 11

Rule 803(3) ..... 7, 8

Rule 803(6) ..... 5

Rules of the United States Court of Appeals for the Second Circuit, Rule 0.23 ..... 2

Miscellaneous:

120 Cong. Rec. S19909 (daily ed., November 22, 1974 ..... 10

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## OPINION BELOW

The oral statement of the court of appeals (Pet. App. 1a-4a)[1] is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on April 4, 1977. Petitions for rehearing were denied on May 27, 1977. The petitions for a writ of certiorari were

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[1]Unless otherwise noted, "Pet." refers to the petition in No. 76-1822.

filed on June 22, 1977 (No. 76-1822) and June 27, 1977 (No. 76-1859). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court erred in excluding business records as unreliable.

2. Whether the district court erred in excluding an out-of-court declaration by petitioner Madonna as hearsay.

3. Whether the district court erred in admitting evidence of a prior similar act.

4. Whether petitioner Madonna's right to testify in his own defense was improperly "chilled" by the district court's ruling that a prior homicide conviction could be used against him for impeachment purposes.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to import, distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. 846 and 963, and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Madonna was sentenced to consecutive terms of 15 years' imprisonment on each count, to be followed by a three-year special parole term, and was fined $25,000. Petitioner Larca was given concurrent sentences of 15 years' imprisonment and three years' special parole. The court of appeals affirmed from the bench after oral argument, with a statement of reasons provided by the presiding judge (Pet. App. 1a-4a). See Rule 0.23, Rules of the United States Court of Appeals for the Second Circuit.



The government's evidence at trial, which was presented through 60 exhibits and the testimony of 24 witnesses, established that from May 1, 1976, through August 31, 1976, petitioners and their co-conspirators conspired to import about $10 million worth of pure heroin from Bangkok, Thailand, to New York via Honolulu, concealed in false-sided suitcases and carried by couriers. The key witness for the government was co-defendant Joseph Boriello, who had pleaded guilty prior to trial. Boriello testified that he traveled to Bangkok in April 1976, acquired a sample of pure heroin, and smuggled the narcotics into the United States during late April or early May (Tr. 109-116, 242-244). After Boriello showed the drugs to petitioner Larca, the men agreed that Boriello would attempt to smuggle a kilogram of heroin into this country from Thailand through use of a courier and would deliver it to Larca. This plan was successfully completed in June 1976 (Tr. 116-135.) Soon thereafter, petitioner Larca and Boriello discussed additional trips to the Far East. Boriello agreed to recruit the couriers, while petitioner Larca agreed to furnish special false-sided suitcases for use in transporting the heroin (Tr. 135-136). Pursuant to this scheme, Boriello recruited two individuals named Gene Travers and Jan Portman (Tr. 151-154, 446-450, 551-554, 595, 681-684), each of whom was interviewed and approved by petitioner Larca (Tr. 151-159, 682-691).

Toward the end of July 1976, Boriello purchased ten kilograms of heroin from his source in Bangkok for $65,000 (Tr. 176-177, 697). Travers and Portman then separately left New York for Bangkok, picked up the narcotics, and transported them to the United States in the false-sided suitcases (Tr. 476, 701). However, both couriers were detected and arrested when they went through customs in Honolulu on August 17 and 18,

1976 (Tr. 702, 732-734). Immediately upon their arrests, Portman and Travers agreed to cooperate with agents of the Drug Enforcement Administration by making a controlled delivery of the suitcases (which had been repacked by D.E.A. agents with flour, sugar and a small amount of the heroin) to Boriello in New York (Tr. 476-478, 565-569, 576-578, 702, 732-737).

On August 20, 1976, Boriello called Travers in accordance with their prearranged plan and told him to stay home for the day (Tr. 187-188, 195-196, 703). Later that afternoon, Boriello visited petitioner Larca and was given an automobile in which to pick up the heroin (Tr. 211, 217, 779-781, 843-845, 936-937). This vehicle had been rented on the previous day by petitioner Madonna using an assumed name (Tr. 648-652; G.X. 35A, 35B). Boriello then drove to Travers' apartment, obtained the suitcases, and began loading the luggage into the rented automobile (Tr. 222-224, 882). At that point D.E.A. agents arrested Boriello, who also agreed to cooperate with the investigation (Tr. 221-226).

Under surveillance by the agents, Boriello drove the automobile to a prearranged meeting spot, where petitioners took delivery of the car and instructed Boriello to return home (Tr. 228, 861, 886, 950). As petitioners entered the automobile containing the suitcases with the real and bogus heroin, they were arrested (Tr. 886-889, 961-962).

## ARGUMENT

1. In an effort to prove that Boriello had received treatment at a methodone clinic in New York during the period he alleged he had been in Thailand, petitioner Larca sought to introduce expurgated xerographic copies of the clinic's records for various dates between April 15 and April 26, 1976 (Tr. 1738). The trial judge admitted



the documents on the apparent understanding that officials of the hospital would be available to demonstrate their authenticity and trustworthiness (Tr. 1740). Later in the trial, during summation, the judge informed counsel that clinic officials would be meeting with him in chambers during the lunch break to discuss the records (Tr. 1842). Petitioners' counsel did not object.

After meeting *ex parte* with the court, one of the officials explained in detail and on the record that the documents introduced by petitioners related only to billing rather than to a patient's actual presence and hence did not support the inference that Boriello had been in New York during the period in question. After defense counsel had examined the official (Tr. 1844-1852), the court excluded the documents, ruling that they were unreliable for the purpose for which they had been offered (Tr. 1852-1853). Petitioners contend (Pet. 13-14; Pet. No. 76-1859, pp. 12-14) that the district court erred both in refusing to admit the clinic records and in failing to afford them an opportunity to examine the individual who had made the record entries.

The district court acted within its discretion in excluding the documents. Rule 803(6) of the Federal Rules of Evidence permits the admission of business records only if they are trustworthy, and the testimony of the clinic official established that these records were not reliable for the purpose for which petitioner Larca had attempted to use them. Nor was their trustworthiness shown, as petitioner Larca suggests (Pet. No. 76-1859, pp. 10-11), by the post-verdict letter from a clinic official stating that Boriello's presence on certain dates in April 1976 could be inferred from other "secondary sources." Whatever inferences might properly have been drawn from the secondary sources themselves in regard to Boriello's

presence at or absence from the clinic, these sources in no way suggested that his presence could be reliably inferred from the documents that petitioner Larca offered into evidence. Indeed, the "secondary sources" confirmed that the business records petitioner Larca sought to have admitted did not "speak directly to the issue of attendance during the time in question" (Tr. 2130). Furthermore, there is no merit to the claim that the court abused its discretion in not deferring its ruling until petitioner Larca called the individual who had made the document entries. The proper time to have laid an adequate foundation for the admission of the documents was when they were introduced, not after both sides had rested and summations had begun.

In any event, even if the district court should not have excluded the records, the error was harmless. Their only function was to attack the credibility of Boriello's testimony that his initial trip to Thailand had occurred in April 1976; the records said nothing about his far more damaging testimony that he had made subsequent trips to Thailand with petitioner Larca's connivance to arrange the smuggling of heroin. It was undisputed that the heroin that Boriello had smuggled into the country using Travers and Portman as couriers was discovered by customs officials in Honolulu and that part of the same shipment of heroin was thereafter seized by surveiling D.E.A. agents while in the possession of Boriello and petitioners. Hence, even if the clinic's records had been admitted, at most they would have indicated that Boriello was mistaken in his recollection of the date of his first trip to Thailand, a fact that was of little significance.

2. As proof that he had had no part in petitioner Larca's loan of the rented automobile to Boriello and no knowledge of any heroin transaction, petitioner Madonna proffered the testimony of two witnesses that they had



heard him shout to Larca in an angry manner, "How could you lend somebody I don't even know my car?" (Pet. 5). Petitioner Madonna claims (Pet. 11-13) that the district court erred in excluding this testimony, contending that the declaration had been offered as evidence of his state of mind rather than to prove the truth of the matter asserted and that it therefore was admissible under Fed. R. Evid. 803(3) as an exception to the hearsay rule.

The declaration, however, went beyond establishing that petitioner Madonna's state of mind was one of anger—a matter that bore little relevance to the factual issues in the case, as the presiding judge of the court of appeals pointed out in his statement from the bench (Pet. App. 3a), and that was in any event proven by other evidence (see Tr. 1256-1257, 1285-1286). Rather, the main thrust of the declaration, as petitioner himself acknowledges (Pet. 4-5), was to show the purported reason for the anger—*i.e.*, that petitioner Larca had loaned the automobile to Boriello without consulting petitioner Madonna—and hence inferentially to establish petitioner Madonna's lack of involvement in the heroin transaction. Since the effect of the declaration would thus have been to prove a past fact by hearsay testimony rather than to indicate petitioner Madonna's then-existing state of mind or future intent,[2] it was properly excluded. See *Shepard* v. *United States*, 290 U.S. 96, 105-106.[3]

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[2] *Nuttal* v. *Reading Company*, 235 F. 2d 546 (C.A. 3), cited by petitioner (Pet. 12), involved declarations that tended to prove the declarant's future intent. See also *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285.

[3] Contrary to petitioner Madonna's suggestion (Pet. 13), the *Shepard* rule is not "time-worn." *Shepard* was explicitly cited in the Notes of the Advisory Committee on Rule 803(3) of the Federal Rules of Evidence in explaining that, "to avoid the virtual destruction of the hearsay rule," proof of state of mind by a hearsay statement is not to be allowed if the statement is capable of serving "as the basis for an inference of the happening of the event which produced the state of mind."

3. Petitioner Madonna claims (Pet. 15-16) that the district court erred in admitting prior similar act evidence. At trial, Nicholas Visceglie testified that in 1972 petitioner Madonna had offered to sell him several kilograms of heroin, using petitioner Larca as an intermediary, but that the transaction was unsuccessful because Visceglie had been unable to raise the purchase money (Tr. 1078-1092). This testimony was plainly admissible.

Rule 404(b), Fed. R. Evid., provides that evidence of other crimes, wrongs, or acts may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Andresen* v. *Maryland,* 427 U.S. 463, 483-484. The prior act evidence in this case, as the presiding judge of the court of appeals observed (Pet. App. 3a), was extremely relevant to prove petitioners' criminal intent and the absence of mistake, since it indicated that petitioner Madonna's relationship with petitioner Larca was not an innocent one and that the meeting with Boriello was not a "mistake" (as the defense sought to prove), and it supported the government's allegation that petitioner Madonna was the senior and silent partner in petitioner Larca's narcotics activities.

Although the trial judge has discretion to exclude evidence of prior acts that are too remote in time or are inadequately substantiated, the judge did not abuse his discretion here. The incident that Visceglie described had occurred only four years earlier, and it was related by a person with first-hand knowledge of the event. Petitioner Madonna's complaint that the testimony was given "by a professional criminal who was incarcerated in the same cell as the chief government witness and who had everything to gain by concocting a pleasing story for the authorities" (Pet. 15) misses the point. This argument goes only to Visceglie's credibility, which was a matter for the



jury. Cases such as *United States* v. *Clemons,* 503 F. 2d 486 (C.A. 8), do not suggest that the witness's credibility must be "clear and convincing"; they require only that his testimony, if believed, must constitute "clear and convincing proof of other similar criminal conduct" (*id.* at 490). The narcotics negotiations to which Visceglie testified clearly satisfied that requirement.

4. Finally, there is no support in the record for petitioner Madonna's contention (Pet. 7-11) that his right to testify was "chilled" by the district court's refusal to preclude use against him for impeachment purposes of a prior homicide conviction. When the matter was initially discussed at a pretrial conference, the court remarked that it did not "have to decide that now" (Tr. 15). Petitioner never renewed his motion, and while the court's formal denial of the motion was dated November 9, 1976, the day before the government's case was completed, the ruling was not actually filed until November 15, after all parties had summed up. Since petitioner Madonna never requested a decision on his motion after the court's initial deferral, and since nothing in the record indicates that he learned of the court's ruling before it was filed, it is extremely unlikely that the ruling played any part in his decision not to testify. Indeed, not only did petitioner never assert below that he would have taken the stand but for the district court's ruling, but also there is substantial evidence that he never actually intended to testify on his own behalf. See August 31, 1976, Tr. 30-31; Tr. 979, 1561.

In any event, the district court's ruling was correct. The homicide for which petitioner Madonna had been convicted was not an "act of violence [resulting] from a short temper, a combative nature, extreme provocation, or other causes," which was held in *Gordon* v. *United*

*States*, 383 F. 2d 936, 940 (C.A. D.C.), certiorari denied, 390 U.S. 1029, to "have little or no direct bearing on honesty and veracity." Rather, it was a cold-blooded killing of a person who had owed petitioner's brother $900 in a narcotics transaction (Tr. 2087, 2165-2166).[4] Proof that a defendant once committed an offense of that nature suggests that he would not hesitate to testify untruthfully in his own defense. See 120 Cong. Rec. S19909 (daily ed., November 22, 1974) (remarks of Sen. McClellan).

Furthermore, use of the homicide conviction for impeachment purposes was permitted by Rule 609, Fed. R. Evid. Petitioner's conviction was punishable by imprisonment for more than one year, he had been released from confinement less than ten years before trial, and both the district court and the court of appeals (Pet. App. 2a) concluded that the probative value of the evidence outweighed its prejudicial effect. Although the trial judge did not make an explicit finding to that effect—a result that is entirely understandable in view of petitioner's failure to press for a ruling on his motion—nothing in the Rule mandates that procedure. Moreover, unlike *Dorszynski* v. *United States*, 418 U.S. 424, or *United States* v. *Smith*, 551 F. 2d 348 (C.A. D.C.), this was not a case in which the district court may have been unaware of its options or of the applicable legal standards; petitioner's

[4]Contrary to petitioner's assertion (Pet. 8), the facts of this homicide had been fully presented to the trial judge during the pretrial bail proceedings (August 24, 1976, Tr. 10; August 31, 1976, Tr. 12; September 2, 1976, Tr. 342; September 3, 1976, Tr. 123, 341, 373). The subsequent reduction of the first-degree murder conviction to manslaughter was the result of a writ of *coram nobis* filed after petitioner had been released on parole and had been charged with a parole violation.



motion and memorandum of law had expressly relied on Rule 609, and the court's denial of the motion therefore clearly signaled its determination that the Rule allowed the conviction to be used for impeachment.[5]

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner Madonna's contention (Pet. 16-17) that the court below erred in affirming his conviction from the bench is insubstantial. Not only is there no requirement that appellate courts write opinions (see *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4), especially in cases of summary affirmances, but also here the court of appeals gave an oral statement of the reasons for its decision.

DOJ-1977-09